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Randomization in Criminal Justice: A Criminal Law Conversation

Bernard E. Harcourt
Columbia Law School, bharcourt@law.columbia.edu

Alon Harel
msalon@mscc.huji.ac.il

Ken Levy
klevy@lsu.edu

Michael M. O'Hear
michael.ohear@marquette.edu

Alice Ristroph

CHICAGO

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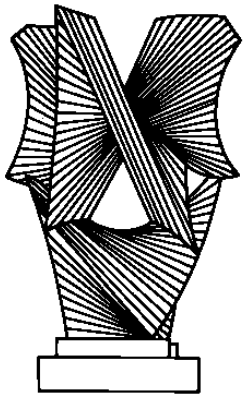

RANDOMIZATION IN CRIMINAL JUSTICE: A CRIMINAL LAW CONVERSATION

Bernard E. Harcourt, Alon Harel, Ken Levy, Michael M. O'Hear and Alice Ristroph

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POST-MODERN MEDITATIONS ON PUNISHMENT: ON THE LIMITS OF REASON AND THE VIRTUE OF RANDOMIZATION

Bernard E. Harcourt*

Introduction

Since the modern era, the discourse of punishment has cycled through three sets of questions. The first, born of the Enlightenment itself, sought to identify and define a rational basis for punishing. As men freed themselves from the shackles of religious faith, this first question took shape: If theologians can no longer ground political and legal right, then on what foundation does the sovereign's right to punish rest? On what basis does the state have a right to punish its citizens? Naturally, the question was not entirely innocent—no good questions ever are. It was animated by a desire to locate the political and moral limits of the sovereign's punitive power at a time that was marked—at least in the eyes of many of the first modern men of reason—by excessive punishments. The *right* to punish, it turns out, would serve to *limit* punishment. This first line of inquiry endures well into the present, and in the Anglo-Saxon tradition at least, the answers draw heavily on a functional analysis of the criminal sanction.

It did not take long, though, for men of knowledge—as Nietzsche described himself—to spot the error in this first line of inquiry. The right to punish, after all, was precisely what defined sovereignty and, as such, could hardly serve to constrain sovereign power. The first question had gotten things backwards: the "right to punish" was what the sovereign *achieved* by persuading its members that it could best promote the legitimate goals of punishment. It was fruitless to look for the right to punish in the purposes, utilities, or functions of the criminal law—whether from a utilitarian or deontological perspective. "[P]urposes and utilities are only *signs* that a will to power has become master of something less powerful and imposed upon it the character of a function,"[1] Nietzsche emphasized. The proper question to ask of the "right to punish," then, was not "on what ground," "of what origin," or "from where" but rather: "How does the sovereign's act of punishing become perceived as legitimate?"

With the birth of the social sciences in the late nineteenth century, this critical impulse gave rise to a second line of inquiry. More skeptical, more critical, the questions probed and excavated deeper processes and forces: If the rational discourse over the right to punish is mere pretext and serves only to hide power formations, then what is it exactly that punishment practices *do* for us? What is the *true* function of punishment? What is it that we *do* when we punish? From Emile Durkheim to Antonio Gramsci and the later Frankfurt School, Michel

* Julius Kreeger Professor of Law & Criminology, University of Chicago Law School. This core text is drawn from *Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtues of Randomization (A Polemic and Manifesto for the Twenty-First Century)*," 74 J. SOC. RES. 307 (2007).

[1] FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 77 (Walter Kaufmann trans., 1967).

Foucault, and *fin-de-siècle* trends in penology, twentieth century moderns struggled over social organization, economic production, political legitimacy, governance, and the construction of the self—turning punishment practices upside down, dissecting not only their repressive functions but more importantly their role in constructing the contemporary subject and modern society.

A series of further critiques—critiques of meta-narratives, functionalism, and scientific objectivity—would chasten this line of inquiry and nudge it around the cultural turn, helping to shape a third discourse on punishment. This third line of inquiry would focus not on what punishment is doing *for* us, but on what punishment tells us *about* ourselves: What do our punishment practices tell us about *our* cultural values? What is the social meaning of our institutions of punishment? Less meta-theoretical, less critical-theoretic, this final set of questions would build on, while simultaneously trying to avoid, the critique of the construction of knowledge. The questions were intended to be less normative. A description at most. A compelling interpretation. Something to make sense of our world and ourselves. Something to ground, perhaps later, an evaluation of those punishment practices.

Yet even this third line of inquiry could not escape the critiques leveled earlier. Any interpretation of the "social meaning" of punishment practices and institutions told us more about the interpreter and her belief systems, than about the meaning of the practice itself. Surely the semiotic enterprise would reveal more about the modes of reasoning, beliefs, and ethical choices held by the individual interpreter than about the social meaning of the punishment practices themselves. As dusk fell on the twentieth century, the modern discourse of punishment was at a stand-still—faced with the painful realization that the same critiques apply with equal force to any interpretation of cultural meaning that we could possibly give to our contemporary punishment practices.

I. The Limits of Reason

What shall we—children of the twenty-first century—do now? Shall we continue to labor blindly—willfully blindly—on this third set of questions, return to an earlier problematic, or, as all our predecessors did, craft a new line of inquiry? What questions shall we pose of our punishment practices and institutions?

The answer, paradoxically, is that it doesn't matter. The formulation of the questions themselves never really mattered, except perhaps to distinguish the analytic philosopher from the critical theorist, the positivist from the cultural critic—minor differences that reflected little more than taste, desire, personal aptitude and training. Yes, new questions were formulated and new discourses emerged, but the same problem always plagued those modern texts.

In all the modern texts, there always came a moment when the empirical facts ran out or the deductions of principle reached their limit—or both—*and yet the reasoning continued*. There was always this moment when the moderns –those paragons of reason—took a leap of faith. It is no accident that it was always there, at that precise moment, that we learned the most—that we

could read from the text and decipher a vision of just punishment that was never entirely rational, never purely empirical, and never fully determined by the theoretical premises of the author. In each and every case, the modern text let slip a leap of faith—a choice about how to resolve a gap, an ambiguity, an indeterminacy in an argument of principle or fact.

Sometimes, the gaps were empirical. So, for example, punishment theorists relied on rational action theory, yet their claims of deterrence were never properly established. The trouble is, in most research on deterrence, it is impossible to divorce the effects of dissuasion from those of incapacitation. The National Academy of Sciences appointed a blue-ribbon panel of experts to examine the problem of measuring deterrence in 1978, but the results were disappointing: "[B]ecause the potential sources of error in the estimates of the deterrent effect of these sanctions are so basic and the results sufficiently divergent, no sound, empirically based conclusions can be drawn about the existence of the effect, and certainly not about its magnitude"[2] Little progress has been made since then. As Steven Levitt wrote in 1998, "few of the[] empirical studies [regarding deterrence] have any power to distinguish deterrence from incapacitation and therefore provide only an indirect test of the economic model of crime."[3] Yet many of us continue to ground our punishment theories on claims of dissuasion and rational choice.

Another illustration, from the field of modern policing. In the early 1990s, several major U.S. cities began implementing order-maintenance strategies, most notably New York City. These strategies rested on the "broken windows theory"—the idea that minor neighborhood disorder like graffiti and loitering, if left unattended, would cause serious criminal activity. The proponents declared that broken-windows had been empirically verified; but still today, the empirical claims remain purely hypothetical.[4] Ironically, only James Q. Wilson, one of the authors of the broken-windows theory, seems to have fully realized the empirical gap. In a *New York Times* interview, Wilson recently admitted, "People have not understood that this was a speculation."[5] As to whether it is right, Wilson concedes, "God knows what the truth is."[6] Nevertheless, our contemporaries continue to rely on broken-windows to ground their policing practices and punishment theories.

Just as often, though, the gaps are not simply empirical, but derive instead from matters of principle. A good illustration involves the famous Anglo-Saxon harm principle. If one looks honestly at the writings of even its originators, it becomes clear that the harm principle itself cannot resolve the central cases for which it was developed. The case of prostitution is telling. John Stuart Mill framed the question as follows: "Fornication, for example, must be tolerated,

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[2] Alfred Blumstein, Jacqueline Cohen & Daniel Nagin, *Report of the Panel on Research on Deterrent and Incapacitative Effects*, *in* DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 42 (Alfred Blumstein, Jacqueline Cohen & Daniel Hagin eds., 1978).

[3] Steven Levitt, *Juvenile Crime and Punishment*, 106 J. POL. ECON. 1156, 1158 n.2 (1998).

[4] BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006).

[5] Dan Hurley, *On Crime as Science (a Neighbor at a Time)*, N.Y. TIMES, Jan. 6, 2004, at F1.

[6] Patricia Cohen, *Oops, Sorry: Seems That My Pie Chart is Half-Baked*, N.Y. TIMES, Apr. 8, 2000, at B7.

and so must gambling; but should a person be free to be a pimp, or to keep a gambling house?"[7] Mill himself never answered the question. "There are arguments on both sides,"[8] Mill suggested. Consistency militated in favor of toleration. On the other hand, pimps stimulate fornication for their own profit and society may elect to discourage conduct that it regards as, in his words, "bad." In the end, Mill refused to take a position regarding the pimp. "I will not venture to decide whether [the arguments] are sufficient to justify the moral anomaly of punishing the accessory when the principal is (and must be) allowed to go free; of fining or imprisoning the procurer, but not the fornicator . . . ."[9] H.L.A. Hart also straddled the fence, finally relying on another principle—the offense principle—to justify prohibiting the public manifestations of prostitution. Faced with a perfect test case to assess the usefulness of the harm principle, both Mill and Hart punt. Why? Because here, as elsewhere, there are harm arguments on both sides of the equation. There is exploitation of women at the very least, and as Catherine MacKinnon has helped us see, significant harm to women in general. Principles alone did not then and do not now resolve the difficult cases in criminal law.

The inevitable space between empirical or theoretical premises and the final judgment derived, in the end, from that imperceptible fissure in human knowledge between the not-falsified, the not-yet-falsified, the apparently unfalsifiable, the verified but only under certain questionable assumptions, and truth. In the empirical domain, no less than in philosophical discourse, proof never followed mathematical deduction but rested instead on assertions – whether empirical or logical—that may well have been true, but for which other entirely reasonable hypotheses could have been substituted. The key issue was always which hypothesis to believe from among the many possible hypotheses, all of which were consistent with the data; which sub-principle to uphold from among all the possible sub-principles that were theoretically coherent with the guiding principle. What the moderns *chose to believe*, ultimately, told us more about them than it did about the world around them.

Those gaps and ambiguities are precisely what have undermined the modern discourse of punishment. Neither the sharpest critics nor the most radical thinkers have ever been able to escape the overpowering urge to build some new construct, a new edifice, some bridge to get to the other side of that epistemological gap. Neither the followers of Durkheim, Marx, or Foucault, nor the cultural critics were able to resist the lure of reconstruction, always cobbling together the "best evidence" to soften their landing.

Many have argued over the ages—and still do—that we should simply continue to muddle and adjust our expectations of truth: that the not-yet-falsified simply *is* the best model—which is, obviously, hard to dispute—and that we should continue to deploy reason to select the most robust empirical inferences and the most coherent deductions of principle. But the idea that we could distinguish between different hypotheses consistent with the data or principles based on what "makes the most sense," "sounds the most reasonable," or "seems the most coherent," is

[7] JOHN STUART MILL, ON LIBERTY 98 (Elizabeth Rapaport ed., 1978).
[8] *Id.*
[9] *Id.* at 99.

simply fantastic. Those types of judgment are so culturally determined and so highly influenced by our particular time and place, it is inconceivable that any rational being today could possibly continue to make those statements at this late stage of modernity—at least, with a straight face.

No more. It is too embarrassing to watch as one generation after another of moderns, under the banner of reason, hop, jump and skip over the gaps of knowledge. One would have thought that phrenology would have been sufficient to stop us in our tracks, but, no, instead we get biological determinist theories of social behavior applied to male rape, moral poverty theories of delinquency applied to super-predator black males, rational action theories applied to suicide bombers—and the list goes on and on of theories that require so many caveats and exceptions that even a child would question our modern claim to rationality. We can no longer leap over the not-yet-falsified. It is no better than turning the clock back and resurrecting faith in divine providence.

II. The Virtues of Randomization

Where does this leave us? The answer must be *randomization*. Where our social scientific theories run out, where our principles run dry, we should leave the decision-making to chance. We should no longer take that leap of faith, but turn instead to the coin toss, the roll of the dice, the lottery draw—in sum, to randomization and chance. And we should do so, I almost hesitate to say, *throughout* the field of crime and punishment.

In the realm of searches, surveillance, detection, law enforcement agencies should turn either to completeness or to random sampling. The Internal Revenue Service could audit tax returns at random using a social security number lottery system. The Transportation Security Administration could search every passenger at the airport, or randomly select a certain percent based on a computer generated algorithm using last names. The Occupational Safety and Health Administration could investigate compliance by employers randomly selecting on employer tax identification number. In these and other prophylactic law enforcement investigations, the agency could very easily replace profiling—which rests on uncertain assumptions about responsiveness and rational action—by randomization.

In choosing law enforcement priorities, governmental agencies should begin allocating resources by chance. The local district attorney's office, as well as the federal prosecutor's office, could select annual enforcement targets (as between, for instance, public corruption, insider trading, drug enforcement, or violent crimes) by lottery. State highway policing authorities could distribute patrol cars through a randomized mapping system using heavily-trafficked roads and interstate highways. The Bureau of Alcohol, Tobacco, and Firearms could choose between equal-impact initiatives on the basis of an annual lottery draw.

And yes, even in the area of sentencing and corrections, courts and prison administrators should—well, perhaps—start thinking about relying more heavily on chance. Judges could impose sentences, following conviction, based on a draw from within a legislatively prescribed

sentencing range; the range could easily be determined, for instance, by felony classifications. The department of corrections could assign prisoners to facilities on a random basis within designated escape-risk or security-level categories. Prisoners in need of drug, alcohol, or mental health treatment could be assigned to comparable programs based on a lottery draw.

This is not as far fetched as it may seem. It does, naturally, assume a sentencing scheme with specified ranges for different degrees of felony. The same kind of randomization, though, could be introduced at the legislative process to decide on actual ranges or to set mandatory sentences (if fixed sentences are preferred to ranges). So, for instance, legislators, having no scientific or principled way to distinguish between 6 or 12 months of imprisonment for an aggravated assault, could turn to chance. Randomization would allow those legislators to pick a mandatory sentence from within those bounds.

The common gesture running through all this is to question and, ultimately, to reject social engineering through criminal punishment. The desire to stop and refuse to take leaps of faith represents nothing more, in practice, than *stopping to engineer* persons and social relations through the criminal sanction. The central impulse is precisely to resist shaping people by means of punishment—and thereby to wipe the field clean of speculative social science and indeterminate principle.

Critical reason reveals the limit of our reasoning abilities. It brings us to the gap where our predecessors always took their leap of faith. It sheds light on those theoretical constructs that the moderns used to bridge the gaps of knowledge. It should now also allow us to clear the field of these fabrications. It should free us to use the only unbiased device to decide our fate—randomization, lotteries, dice, chance. And the point is not to roll the dice as between different theories all of which require a leap of faith, but instead to use critical reason to take those theories *off the table*. To eliminate them—and thereby to stop social engineering.

I should emphasize that my central claim here is *not* that we can know *nothing*. No. We have some basic intuitive knowledge that no one can dispute. As an empirical matter, we know that if we execute someone, we are not going to be able to rehabilitate them. As a matter of principle, we know that murdering an innocent person is worse than stealing their wallet. We know that raping someone is worse than spraying graffiti. We know that punishing an entirely innocent person is wrong. And we can use these minimal ingredients of certainty to set limits to the use of chance. So, for instance, we do not draw punishments for murder and pocket-picking—or for rape and vandalism—from the same urn. We do not decide who to accuse by drawing lots. These elementary forms of knowledge allow us to rest our punishment practices minimally on very basic notions of proportionality. For instance, the convicted murderer and the person exceeding a speed limit are not to be treated the same. We impose proportionality constraints on the use of chance. Perhaps we create a category for homicide, another for serious bodily or psychological injury, and another for property damage. There *are* some natural limits to the use of randomization.

We only turn to chance when *our social science and principles run out*. The easy cases are where our social science findings rest on bad evidence, weak data, or faulty models, where

there is no scientific evidence at all, or where there are competing and equally-plausible hypotheses that are all similarly non-falsified—in other words, when we do not have reliable social science findings to rely on. This, I take it, can hardly be contested. No one wants to affirmatively and intentionally punish another human being on the basis of bad science or no science at all.

You may ask, naturally, why turn to randomization? There are other alternatives, after all. At the point of making that punishment decision, we could simply stick with what we have done in the past. We could use the same punishments as our mothers and fathers did. We could heed to the status quo. The problem is, their judgments were precisely the product of years and years of uncritical leaps of faith. We will have learned nothing from the exercise of critical reason. Alternatively, we could turn to the democratic process and allow the legislature to decide. But in the end, their vote will reflect nothing more than prejudice, ideology, bias, and, again, leaps of faith. We could decide simply to impose our tastes and aesthetic preferences; but that seems problematic and, perhaps even, irrational.

No, we must turn instead to randomization *because we have no other choice*. We must turn to the lottery because it is the only way to act *within the bounds of critical reason*. We must turn to randomization *by default*. Sure, randomization may have some positive values. It may remind us that our knowledge claims are limited. It may remind us of the frightening role of ideology in our punishment practices. It may help gather information; by using a form of random sampling, we may in fact learn a lot about the world of deviance that surrounds us. Randomization may offer more transparency in our policy making. And in fact, it may be more efficient than the alternative. But none of these are the reason we turn to randomization. We turn instead because there is no alternative that satisfies critical reason.

III. Responding to Critics

Randomization is by no means foreign to the law. A number of states statutorily prescribe a flip of the coin to resolve election ties. In New Mexico, it's a poker hand that resolves a tie. Courts as well have turned to chance to resolve election disputes, and a number of courts also partition disputed land by lot or chance. Randomness also surfaces across a number of policing strategies, including sobriety checkpoints and the random selection of airline passengers for further screening at airports. Chance also plays a large role in the detection of crime: who gets apprehended and who does not most often turns on luck. Even fixed sentencing schemes have a significant element of chance. A lot turns on the luck of the draw regarding which judge—lenient or stern—presides over the sentencing.[10]

Nevertheless, a call for more randomization will undoubtedly meet with great resistance. Many will instinctively protest that the use of chance is far less efficient than profiling or

[10] Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime*, AM. L. & ECON. REV. 276, 292 (1999).

targeting higher offenders—that it is wasteful to expend law enforcement resources on low-risk offenders. There's no point conducting extra airport security checks on elderly grandmothers in wheelchairs and families with infants—or "Girl Scouts and grannies," as one recent commentator writes.[11] As I demonstrate elsewhere with equations and graphs, however, profiling on the basis of group offending rates may in fact be counterproductive and may actually increase crime even under very conservative assumptions regarding the comparative elasticities of the different populations.[12] We have no good reason to believe that targeted enforcement would be efficient in decreasing crime and would increase, rather than decrease, overall social welfare.

More sophisticated economists may respond that targeting enforcement on groups that are more responsive, at the margin, would maximize the return of any law enforcement investment.[13] But here, we face an empirical void. What we would need is reliable empirical evidence concerning both the comparative offending rates and the comparative elasticities of the targeted and non-targeted populations. I derive the exact equation for this elsewhere.[14] That evidence, however, does not exist. The problem is not the reliability of the evidence; it's that it simply *does not exist*. If there ever was a place to avoid taking leaps of faith, surely it would be here, where there is no empirical data whatsoever.

The conventional wisdom among law-and-economics scholars is that increasing the probability of detection serves as a greater deterrent to crime than increasing the amount of the sanction because of the high discount rate imputed to criminals. Assuming this is true, the decision to embrace randomization in sentencing should have no effect on deterrence. Using a sentencing lottery to determine the length of incarceration from within a sentencing guideline range, rather than using a grid that places great weight on prior criminal history, gun use or other factors, would not change the *certainty* of the expected sentence and need not change the *amount* of the expected sentence.

Some behavioral law and economists have argued that the certainty of a criminal sentence—the fact that the size of a criminal sanction is fixed and known ahead of time—may deter criminals more effectively than uncertain sentences and, on those grounds, have argued against sentencing lotteries.[15] However, more recent research involving actual experimental studies suggests that uncertainty regarding a sanction may be *more* effective at deterring criminal behavior. Experiments by Alon Harel, Tom Baker and Tamar Kugler reveal that a sentencing

[11] Paul Sperry, *When the Profile Fits the Crime*, N.Y. TIMES, July 28, 2005.

[12] BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 129-32 (2007); Bernard E. Harcourt, *Muslim Profiles Post 9/11: Is Racial Profiling an Effective Counterterrorist Measure and Does It Violate the Right to be Free from Discrimination? in* SECURITY AND HUMAN RIGHTS (Benjamin Goold & Liora Lazarus eds., 2007).

[13] Yoram Margalioth, *Looking at Prediction from an Economics Perspective: A Response to Harcourt's* Against Prediction, 33 L. & SOC. INQ. 243 (2008).

[14] HARCOURT, *supra* note 12, at 133.

[15] Harel & Segal, *supra*, at 280.

lottery may in fact be better at deterring deviant behavior than fixed sentences.[16] Other psychological experiments have similarly shown individuals to be averse to ambiguity.[17]

Randomization in sentencing will likely meet much greater resistance, though, not because of efficiency concerns, but rather because of considerations of fairness, just punishment, and desert. A large body of philosophical and legal literature has grown around the issue of luck in criminal sentencing, some of it tied to the larger debate over what Thomas Nagel and Bernard Williams coined "moral luck." In these debates, most of the commentators oppose the use of chance, in large part, I would suggest, because we all tend to believe that there is a rational alternative. We continue to believe that there is a better way, a more rational way, a more morally acceptable way.

In discussing penal lotteries, R.A. Duff observes that lotteries are generally justified, from the perspective of fairness or justice, only when "there is no other practicable or morally acceptable way of distributing the benefit or burden in question."[18] Lotteries are justified as a default mechanism when there is no other morally justifiable way: "What justifies such lotteries . . . is the fact that it is either impossible to eliminate them, or possible to reduce or eliminate them only at an unacceptably high cost."[19] In this, Duff has it right. What justifies lotteries, morally, is the lack of an alternative. Where he has it wrong, though—and where everyone seems to have it wrong—is in believing that *there is a rational alternative*. The fact is, we have hunches. We take leaps of faith. But we do not have good evidence or determined principles that resolve the sentencing ambiguities. Sentencing lotteries make sense, in the end, precisely because *we have no better choice*.

IV. Conclusion

The final triumph of reason is near. Reason has finally reached that state of self-consciousness that will allow it to identify its own limits and stop there. No longer to rely on blind faith to bridge the inevitable gaps, ambiguities, and indeterminacies of human knowledge, no longer to fill that space beyond the non-falsified hypothesis, reason will relinquish the realm of punishment to chance, the coin toss, the roll of the dice—to randomization.

This would mark, I believe, the end of punishment as a transformative practice—as a practice intended to change humans, to correct delinquents, to treat the deviant, to deter the super-predator. It would usher in a world, effectively, *without punishment*. It would not be a world without anything that could be described as punishment. The person convicted of murder or embezzlement may still be sentenced to a term of imprisonment. But it would be a world in which we have ceased to punish in furtherance of hunches and unfounded theories. A world in

[16] Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443 (2004).
[17] Harel & Segal, *supra*, at 291.
[18] R.A. Duff, *Auctions, Lotteries, and the Punishment of Attempts*, 9 L. & PHIL.1, 26 (1990).
[19] *Id.* at 27.

which we no longer engage in punishment as a practice of social engineering. A world in which punishment is chastened by critical reason.

GAMES PUNISHERS PLAY

Alice Ristroph*

To run a lottery is to choose to prioritize chance. To play the lottery is to make a choice to take a chance. One might choose otherwise. Knowing many aspects of human experience are random, one might still decline to play Russian roulette. Harcourt's meditations obscure the difference between the inevitably random and the deliberately random*ized*, but do they obscure by chance or by design? Perhaps Harcourt's meditations are best read as Swiftian: a seemingly earnest celebration of random punishment that invites us to reflect on the violence of punishment itself.

Two famous stories illuminate Harcourt's modest proposal that offenders be sentenced to randomly selected punishments. Jorge Luis Borges tells of the Babylon lottery, originally a simple game in which plebians purchased chances to win cash prizes. To stimulate more interest, the lottery was reformed to offer both rewards and punishments: some players would become rich, but others would pay a fine or go to jail. The lottery's administrators—"the Company"—offered chances to "win" increasingly diverse positive or adverse consequences. Enamored of the game, the people asked that the Company assume control of all public affairs. All citizens demanded (or were required?) to participate: the lottery became "secret, free, and general."[1] Now, the drunkard, the dreamer, and the rich man each live as the lottery dictates. But mysteries remain: some say that the Company is eternal, some whisper that it is omnipotent but concerned only with trivialities, and some claim that "*the Company has never existed and never will*."[2] A lottery is orchestrated chance, but in this story, the orchestra's conductors appear and disappear. Thus Borges blurs the line between choice and chance.

Shirley Jackson's "The Lottery" is less subtle, and was—at its publication—much more provocative. In a small town, the locals assemble. It is the day of the lottery, and everyone is excited. Children gather smooth, round stones in one corner of the town square. The women gossip and the men talk business or tell jokes. A few townspeople observe that other towns have abandoned their lotteries, but an old-timer scoffs at that foolish notion. "Lottery in June, corn be heavy soon," he says.[3] The lottery begins. The male head of each household selects a paper from a box. They open their papers and discover that Bill Hutchinson has the marked paper. Tessie Hutchinson begins to protest, but the lottery moves to the second stage: five new slips are placed in the box, one each for Bill and Tessie and their three young children. Each family member draws, and now Tessie has the marked paper. As she continues to protest, the townspeople grab stones. The first stone hits Tessie's head, "and then they were upon her."

* Associate Professor of Law, Seton Hall University School of Law.

[1] JORGE LUIS BORGES, *The Babylon Lottery*, *in* FICCIONES 68 (1962).

[2] *Id.* at 71-72.

[3] Shirley Jackson, *The Lottery*, THE NEW YORKER , June 26, 1948, at 25.

Tessie Hutchinson is safe from Harcourt. He would inject randomization into policing as well as punishment, but he would not "decide who to accuse by drawing lots."[4] Old-fashioned reason *can* tell us who to punish, Harcourt claims, and it can even dictate a spectrum of appropriate penalties. But it cannot tell us precisely which penalty; to answer that question, Harcourt would have officials select sentences randomly within a prescribed range. This suggestion seems to rest on an assumption that punishment just *is*—it exists and we have no choice but to distribute it one way or another. If social science fails to provide us with a distributive principle, embrace randomization.

But of course punishment isn't just there, in need of some distributive principle. It is a human practice, and there are human punishers. We choose to punish, as Harcourt sometimes acknowledges. "No one wants to affirmatively and intentionally punish another human being on the basis of bad science or no science at all."[5] If this claim is true, one would expect humans to be similarly averse to imposing punishment randomly. Instead, if reason dictates a spectrum of appropriate penalties, why not impose the minimum?

One explanation, implicit in Harcourt's meditations, is that in many persons, the demand to punish is independent of, and indifferent to, scientific knowledge. These punishers have already identified a distributive principle more palatable than randomization. They call it retribution, and it is delightfully non-falsifiable. Some retributive theories perform the same feat as Babylon's lottery: they depict the Company that orchestrates punishment as the dutiful representative of the people themselves. Retributivists tell the prisoner, like the Babylonian might tell the miserable drunkard, that one's present circumstance is the product of one's past gambles.

For those unmoved by retributive theory, and yet persuaded by Harcourt's critique of social engineering through punishment, there is another option. Some towns have abandoned their lotteries. Some choose not to stone anyone. For some of us, the moment when reason runs out is not the time to roll the dice, but the time to stop punishing.

[4] Harcourt Core Text at [5].
[5] *Id.*

CHANCE'S DOMAIN

Michael M. O'Hear*

Bernard Harcourt argues eloquently against the Enlightenment ideal of social engineering through punishment, but his *bête noir* has only a shadowy existence in the real world of American criminal justice. We already have a system that is dominated by chance. With low—sometimes vanishingly small –apprehension and prosecution rates for most categories of crime, it is perfectly clear that luck plays a crucial role in determining which offenders face charges. And, once in the court system, an offender's punishment will be largely determined by the random assignment of judge, prosecutor, and public defender, and by the various bureaucratic and political exigencies they happen to perceive as they exercise discretion over the offender's fate.

Although criminal law theorists may dream of social engineering, and may occasionally persuade policymakers to embody their schemes in formal law, chance must inevitably play a central role in the administration of criminal justice in a nation that systematically diffuses government power, keeps taxes and public expenditures low, and nonetheless insists on tough responses to whatever is the crime *du jour*. Our criminal justice system lacks the capacity and the will to attempt social engineering at much more than a rhetorical level.

The real question posed by Harcourt is not whether we will have a system driven by chance, but whether we will acknowledge the open secret of randomness and attempt to do randomness in a more principled way. Seen in this light, Harcourt's basic project has much to recommend it. Among legal actors and scholars, the accepted modes of talking about criminal law and process make it difficult to discuss chance as anything but an embarrassing and aberrational feature of the system. Harcourt argues, however, that our desultory efforts at social engineering are what ought to be regarded as the real embarrassment. His project opens space for a conversation about the proper domain of chance, and offers an opportunity to bring our rhetoric into closer alignment with our practices.

But what exactly should be chance's domain? Harcourt does not differentiate adequately among a diverse range of criminal justice decisions. For instance, I find the case for randomization in police investigative decisions far more compelling than the case for randomization in judicial sentencing decisions. No effective mechanism currently exists for public explanation and external review of investigative decisions—the Fourth Amendment jurisprudence might have headed in that direction, but it has not—and given the volume and speed with which officers must make decisions, it is unlikely that such a mechanism will be developed any time soon. In the absence of explanation and review, investigative decisions are widely perceived to be arbitrary, especially in the communities that bear the brunt of law enforcement activity. In this context, making randomization more overt and broadly systematic

* Professor of Law & Associate Dean for Research, Marquette Law School.

(e.g., every twentieth car gets pulled over, not every fifth car driven by a black person) may prove to be a more effective way of dealing with the perception and reality of invidious discrimination than any effort to develop and enforce principled, comprehensive, race-neutral criteria for police decision-making.

In contrast to police investigative decisions, judicial sentencing decisions can be, and typically are, structured around participatory, public proceedings. Moreover, sentencing decisions are explained decisions, and the reasoning process is subject to appellate review. Some judges and some jurisdictions pull this off much better than others, but the sentencing process at least potentially embodies the values that Tom Tyler and other social psychologists refer to as procedural justice. This is, of course, a "leap of faith" on my part, but I would contend that procedural justice is worth pursuing, both as a good in itself and because it enhances the system's legitimacy. Randomization, however, would radically undermine the social meaningfulness of the sentencing process –indeed, within the framework that Harcourt seems to envision, it is not clear why there would be any sentencing process beyond the selection of a number from the appropriate "urn" (as determined by the offense of conviction).

To be sure, the sentencing judge is routinely guilty of precisely the same offense that Harcourt accuses criminal law theorists of committing: "there always [comes] this moment when the empirical facts [run] out or the deductions of principle reach[] their limit . . . and yet the reasoning continue[s]."[1] An inevitable cost of a meaningful sentencing process may be a final decision that promises a higher degree of rationality that it can actually deliver. If intellectual honesty is a concern—and I agree with Harcourt that it should be—an alternative to randomization may be greater rhetorical humility, with judges admitting where the decisions become difficult and eschewing grandiose claims about the social benefits of the sentences they pronounce.

[1] Harcourt Core Text.

THE LURE OF AMBIVALENT SKEPTICISM

Alon Harel*

Theorists can be divided into those who seek to unearth reasons for social practices and those who raise their hands in desperation and provide reasons why one should not go looking for such reasons—why such search is a futile, or worse, a disingenuous enterprise. Bernard Harcourt falls into the latter camp. What I would like to do is to hoist the latter strategy on its own petard by showing that it is vulnerable to the very same objections it raises against the former strategy.

Harcourt believes that:

> In all the modern texts, there always came a moment when the empirical facts ran out or the deductions of principle reached their limit—or both—*and yet the reasoning continued*. There was always this moment when the moderns—those paragons of reason—took a leap of faith.[1]

Consequently, Harcourt is critical of the very effort to establish a complete and comprehensive "new construct or a new edifice;" namely, a comprehensive justification of punishment.[2] To establish his skeptical outlook, Harcourt criticizes harshly existing theories purporting to provide a comprehensive justification of punishment. A theorist trained in the analytic tradition may be somewhat concerned that these criticisms are too sketchy. Yet it would be too hasty to criticize Harcourt for lack of rigor simply because his criticisms of existing theories are sketchy and incomplete. The critical discussion in his core text is only illustrative. It is not meant to persuade the un-persuaded, but only to provide some data for a skeptical reader who ultimately shares Harcourt's skeptical outlook.

But what can we infer from such a skeptical and critical outlook? Harcourt suggests that his critical outlook is not futile; in fact, it generates very specific and concrete recommendations for the policy-maker. Harcourt argues that:

> Where our social scientific theories run out, where our principles run dry, we should leave the decision-making to chance. We should no longer take that leap of faith, but turn instead to the coin toss, the roll of the dice, the lottery draw—in sum to randomization and chance.[3]

* Phillip P. Mizock & Estelle Mizock Chair in Administrative & Criminal Law, Hebrew University Law Faculty.
[1] Harcourt Core Text at [1].
[2] *Id.* at [3].
[3] *Id.* at [4].

The skeptical reader may, as Harcourt notices, turn his skepticism towards randomization and ask "Why turn to randomization?"[4] In response, Harcourt endorses two incompatible answers. First, in an attempt to ground randomization in a moral principle, Harcourt argues that the refusal to ground punishment in theory

> represents nothing more, in practice, than stopping to engineer persons and social relations through the criminal sanction. The central impulse is precisely to resist shaping people by means of punishment—and thereby to wipe the field clean of speculative social science and indeterminate principle.[5]

This move is promising but, of course, it is premised upon a moral principle that engineering people through criminal law is wrong. Some people may dispute that an attempt to deter people (even if it is not scientifically sound) is a form of engineering and others may question why engineering of this type is legitimate when done by education or tort law but not when done by criminal law.

Harcourt may have answers to these questions and I probably would sympathize with these answers. But it is important to note that by establishing this claim Harcourt is engaged in the very same enterprise that he condemns; namely, unearthing reasons for concrete social practices by establishing the soundness of theoretical premises and deriving from these premises the principle of randomization.

Second, Harcourt takes a different position, defending the view that we "turn to randomization *because we have no other choice*."[6] Presumably Harcourt means to say that we have no *better* choice. After all, Harcourt core text itself shows that we have other choices and we often make them. But, lack of better choices requires Harcourt at the very least to establish that randomization is better than any other principle of punishment and establishing such a claim must be premised upon a moral principle or a social science finding of the type Harcourt condemns. Just as moral relativism cannot establish the justifiability of multiculturalism, Harcourt's global skepticism concerning existing theories of punishment cannot justify randomization.

Harcourt therefore faces a dilemma. If he defends randomization, he ought to use the traditional tools of moral theory or social science and abandon therefore his skepticism. If he defends skepticism, he ought to abandon randomization. If I were to choose I would abandon skepticism for the sake of defending randomization.

[4] *Id.* at [5].
[5] *Id.* at [4-5].
[6] *Id.* at [5].

PUNISHMENT MUST BE JUSTIFIED OR NOT AT ALL

Ken Levy*

Bernard Harcourt is skeptical that punishment can be justified. So he suggests that we should simply give it up. But rather than stopping there, Harcourt offers a positive proposal as well. Harcourt proposes that we conform our law enforcement practices to the ultimate "un-justifiability" of punishment by applying chance or randomization in our allocation of law enforcement resources, annual enforcement targets, post-conviction sentences, and legislatively determined sentence ranges for particular crimes.

We have reason, however, to resist Harcourt's skepticism. First, the argument that he provides in support of his skeptical thesis suffers from both a confusion of power and right and a misunderstanding of the relationship between sovereignty and the right to punish. Second, we have a very good reason to think that *we must never give up* on justifying punishment.

I understand Harcourt's skeptical argument to run as follows:

1) The attempt to justify punishment is the attempt to determine what gives the sovereign (or State) the right to punish.
2) What defines the sovereign just *is* its right to punish.
3) ∴ It makes no sense to ask where the sovereign *gets* its right to punish. The right to punish is part of its very definition.
4) ∴ It makes no sense to attempt to justify punishment.

The first problem with this argument is that (2) confuses power with right. By definition, sovereigns have the *power*, but not necessarily the *right*, to punish. Sovereigns who do *not* have the right to punish are illegitimate; they came to power illegitimately—e.g., through an undemocratic seizure of power. Conversely, a legitimate authority may have the right to punish but *not* the power if it is stymied in any way—for example, by an elusive suspect or hostile occupation by an invader. Because power and right are conceptually distinct, it still makes perfect sense to ask whether or not a given (legitimate) sovereign, or (legitimate) sovereigns in general, *should* have the power to punish.

The second problem with Harcourt's argument is that even a legitimate sovereign is not necessarily *defined* by its right to punish. What *makes* it sovereign—what *makes* the (legitimate) State *the State*—is not its right to punish but its right to *govern*. Of course, one might respond that the right to govern just *is* the right to punish. But this point is false.

First, it is perfectly possible to imagine a sovereign whose electorate grants it the right to govern but *not* the right to punish. When the sovereign then asks the electorate how it will

* Climenko Fellow & Lecturer on Law, Harvard Law School.

enforce the laws that it creates, the electorate has some possible responses: by providing only carrots, no sticks; or by "treating" all law-breakers rather than punishing them. Second, even if the right to govern *entails* the right to punish, this entailment would not amount to an identity. For the right to govern might entail a number of other rights that are distinct from the right to punish—e.g., the right to legislate. Third, even if governing requires punishing, this would mean only that punishment is a necessary means to the end of governing. And ends are not necessarily, or even usually, defined by their means.

Not only do we have these reasons to reject Harcourt's skeptical conclusion that the project of justifying punishment is futile and misguided; we also have a positive reason to believe that the project of justifying punishment is *morally obligatory* and therefore perfectly sensible. Consider the following argument:

5) People have a strong self-interest in not being punished.
6) People should have legally recognized rights protecting their interests.
7) ∴People should have a legally recognized right not to be punished.[1]
8) The State should not violate citizens' rights.
9) Most rights, including the right not to be punished, are merely presumptive, not absolute.
10) ∴The State may punish a citizen if it has a sufficiently strong interest.
11) The State's sufficiently strong interest is its *justification* for inflicting that particular punishment.
12) ∴The State may punish a citizen only if it has a sufficiently strong justification to do so.

(5) seems difficult to deny, and (11) is merely definitional. (6), (8), and (9) are more controversial because they derive from classical rights theory, which is only one among several plausible political theories. Other plausible political theories might deny the importance of, or need for, individual rights and prioritize instead religion, morality, community, technology, national security, or GNP over the individual. But the timeworn project of justifying classical rights principles is not really necessary here—especially given my sense that Harcourt himself subscribes to them. Rather, I will settle for the less ambitious point that if one accepts classical liberal principles, then one must accept (5) through (12) above and therefore the legitimacy and urgency of the project of justifying punishment, both generally and in its specific applications.

[1]See DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 92–103 (2007).

REPLY

Bernard E. Harcourt

Alice Ristroph compassionately throws me a lifeline. Perhaps my call for randomization is better understood as Swiftian satire, meant to underscore the extent of arbitrariness in our contemporary punishment practices. How I wish I could grasp that rope to safe harbor! But alas no, there is no such elegant way out. Critical reason identifies the boundaries of knowledge and there, there we have no choice but to embrace chance.

To be sure, there are, as Alon Harel correctly observes, alternative ways of resolving impasses at points of indeterminacy—we could heed the status quo, leave it to a popular vote, or simply impose our tastes—and there exist positive arguments for choosing randomization over those alternatives. My colleague, Adam Samaha, identifies at least four of those paths to chance. Some theorists –Jon Elster is one—embrace randomization because they believe that, at least in certain limited domains of uncertainty, it may be more honest—and more consistent with rational choice preferences. Others endorse randomization as the only method that produces the equal chance of an outcome. Others embrace chance for pragmatic reasons, and still others, as a form of experimentation—as in the randomized trial.[1]

I embrace chance from a different, a fifth perspective—what may best be described as a critical theoretic perspective.[2] Critical reason exposes the leaps of faith that we regularly take in our empirical and principled reasoning—including, I should note, in the behavioral and rational choice approaches which even lead some, such as Elster, to embrace randomization. Critical reason thus exposes a capacious sphere of indeterminacy, far larger than most imagine.[3] At those points of impasse, I argue, we must turn to chance *by default*, because there is no other way to avoid taking another leap and imposing our preferences, ideology, habits, training, or tastes. From this perspective, chance does not have a *positive* value. It is not more honest, nor more practical. It does not afford the benefits of a randomized trial. It is, instead, the only way to avoid another leap of faith beyond the limits of reason.

My commentators mistake my nominalism for skepticism. I am not, foremost, a skeptic. There are things we *can* know—for instance, true facts that can guide our practices of randomization, or veritable limits to reason that delineate the domain of chance. There *is* a difference between innocence and responsibility for human action. Embracing chance need not entail stoning one's neighbor by lot, nor being declared invisible by lottery. I am confident that

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[1] *See* Adam Samaha, Randomization in Adjudication (October 24, 2008) (unpublished manuscript).

[2] Raymond Geuss offers a useful definition of critical theory in *The Idea of a Critical Theory*. *See* RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL (1981). While Geuss focuses on the Frankfurt School, several other traditions, ranging from Freudian psychoanalysis to contemporary poststructuralist thought, share in this critical tradition.

[3] *E.g.*, Jon Elster, *Taming Chance: Randomization in Individual and Social Decisions*, *in* 9 THE TANNER LECTURES ON HUMAN VALUES 105, 157 (Grethe B. Peterson ed., 1988) ("I do not think there are any arguments for incorporating lotteries in present-day criminal law.").

we can escape these fates by deploying a modicum of knowledge. Rather than skepticism, it is nominalism that guides my position—a sincere belief in the indeterminacy of broad categories, such as harm, order, deterrence, or even deviance. Those categories mask the irreducible individuality of human behavior, naturalize the distributional consequences of endorsing particular theories, and as a result, necessarily impose ideological commitments on our punishment practices.

Does that mean that I am simply "raising my hands in desperation"? I think not. It is, instead, an act of humility. A humble gesture in the face of over three centuries of Enlightenment reason in punishment—of forced sterilization, solitary confinement, chemical castration, eugenics, electro-shock therapy, individual gas chambers and electric chairs, phrenology, and now, mass incarceration. Our track record of enlightened punishments is stunning and, frankly, it humbles me. I contend that it should also chasten our embrace of the alternatives to chance.

Ken Levy urges me to continue the project of *justifying* punishment. The error in my argument, Levy contends, is that it "confuses power with right." Here I must confess—*mea culpa!* But it is no mere accidental confusion. What we believe about *the right to punish* is ultimately the product of complex relations of power that distribute *veridiction*—the production of truth—on the basis of a confluence of forces, including hierarchies of disciplines, ideological drift in discourse, and complex sociologies of professions. These relations of power end up privileging one type of discourse over another—whether it is the psychological language of mental illness, the economists' tool of rational choice, or the retributive notion of just deserts. Our sincere belief in any one of these ways of talking about the *right to punish*, in the end, is inextricably intertwined with relations of power between and among disciplines and professions.

Michael O'Hear acknowledges the significant role of randomness in contemporary punishment practices. But he asks, why not then channel randomization in more pragmatic directions? This sounds entirely reasonable. The trouble is, the domain of chance cannot be set by practical considerations. It is delimited, instead, by the boundaries of knowledge. Others—younger and wiser, perhaps—can explore the advantages of carefully bounded randomization.[4] But I come to chance from a different, from a critical theory angle—and from this perspective, it is absolutely crucial not to let ideology slip back in.

The most difficult challenge, in the end, is Alice Ristroph's—captured so brilliantly in the last sentence of her essay, which cut into me like a knife. "For some of us, the moment when reason runs out is not the time to roll the dice, but the time to stop punishing."[5] Indeed, why punish at all when we have reached the limits of reason? Here, I must confess again. I am human, all too human. There is a haunting passage of Nietzsche's that often comes back to me. It is in his *Genealogy of Morals*, where he writes:

[4] Adam Samaha is doing just that in *Randomization in Adjudication*. Lior Strahilevitz is also probing the virtues of chance in the law of abandonment – as a potential vehicle to reduce decision costs. *See* Lior Strahilevitz, The Right to Abandon (Oct. 23, 2008) (unpublished manuscript, on file with author).

[5] Ristroph Comment.

> As its power increases, a community ceases to take the individual's transgressions so seriously . . . . It is not unthinkable that a society one day might attain such a *consciousness of power* that it could allow itself the noblest luxury possible to it—letting those who harm it go *unpunished*. "What are my parasites to me?" it might say. "May they live and prosper: I am strong enough for that!"[6]

I aspire to one day believe that our society will achieve that consciousness of power or that degree of strength—for it is strength, I take it, that allows one to thrive along with ones parasites. I fear that I am not yet there. But I so admire Alice Ristroph for keeping the idea alive.

Readers with comments should address them to:

Professor Bernard Harcourt
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
harcourt@uchicago.edu

[6] FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 72 (Walter Kaufmann & R.J. Hollingdale, trans., 1989).

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